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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 334

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JOE WADE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 44–49) is reported at 358 F. 2d 557.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1966 (R. 50). A petition for rehearing *en banc* was denied on May 11, 1966 (R. 51). On June 15, 1966, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including July 11, 1966 (R. 52). The petition for a writ of certiorari was filed on July 11, 1966, and certiorari was granted on October 10, 1966 (R. 53). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a lineup (at which respondent and the five or six other participants were asked to utter a specified sentence) was conducted after indictment and without notification to respondent's counsel required exclusion of the courtroom identification of respondent by the witnesses who had identified him at the lineup.

STATEMENT

Respondent was convicted after a trial by jury, in the United States District Court for the Eastern District of Texas, under a two-count indictment charging that he conspired to rob, and did rob, a federally insured bank in violation of 18 U.S.C. 371 and 2113 (a) and (d) (R. 1–3). He was sentenced to imprisonment for five years on the conspiracy count and for fourteen years on the robbery count, the sentences to run concurrently (R. 42–43). The court of appeals reversed, one judge dissenting (R. 44–50).

1. The evidence showed that a bank in Eustace, Texas, was robbed on September 21, 1964. While one man waited outside in a parked automobile, another man, with a small strip of tape on each side of his face, entered the bank, aimed a pistol at Jean Chambers and Lee Gray, the bank's two employees, handed them a pillow case, and ordered them to fill it with currency. The employees complied. The robber then fled with his accomplice in a waiting car (R. 7–19, 27–31; Tr. 135–139, 188–189, 195).[1]

[1] "Tr." refers to the typewritten transcript of the trial proceedings.

On March 23, 1965, an indictment was returned charging respondent and two others (named Pickett and Briggs) with conspiring to rob the Eustace bank, and charging respondent and Briggs with executing the robbery (R. 1–3).[2] Respondent was arrested on April 2, and on April 26 an attorney was appointed to represent him (R. 5). On May 12, without notice to respondent's appointed counsel, respondent and five or six other prisoners were taken from their jail cells for the purpose of appearing in a lineup before the two bank employees who had witnessed the robbery (R. 22–23, 30–31, 37). The prisoners were assembled in the hall outside the courtroom in which Mrs. Chambers and Mr. Gray were seated (R. 22–23). A door between the courtroom and the hall was opened (R. 22–24, 34), and Mrs. Chambers caught "[j]ust a glance" of respondent (R. 24). She saw no one else in the hall and did not know whether or not respondent was in custody or under guard (R. 23). Mr. Gray was also able to see through the open doorway, and observed Kenneth Albert, whom he knew to be an F.B.I. agent (R. 34). He also saw a person who "resembled" respondent (R. 34) but could not say definitely that it was respondent (R. 32–33). The prisoners, including respondent, were then brought into the courtroom (R.

[2] In February and March, 1965, Pickett and Briggs, who had earlier been sentenced, on guilty pleas, for the robbery of a San Antonio bank, but who had denied robbing the Eustace bank, gave written statements to F.B.I. agents acknowledging their complicity in the Eustace robbery and disclosing respondent's involvement (Tr. 96–98, 100–101, 103, 174–175, 178–179).

24). All wore tape on their faces (R. 24–25, 31) as had the robber of the bank (R. 11, 30). Each was asked to repeat the phrase, "Put the money in this bag", or words of similar import.[3] The two employees identified respondent as the man who had committed the robbery (R. 24, 31, 35).

2. At trial, after respondent's two accomplices testified on behalf of the government,[4] Mrs. Chambers described the robbery in detail (R. 7–19) and identified respondent as the man who had taken the money at gunpoint (R. 12). At the time of the robbery, she stated, he wore grey khaki pants, a long-sleeved sport shirt, and a straw hat. He had carried a nickel-plated gun and a pastel-striped pillow case, and had strips of tape affixed to his face (R. 11–12). On cross-examination, defense counsel elicited the fact that after the robbery the witness had picked respondent's picture out of a group of eight or nine photographs (R. 20). Defense counsel also elicited, for the first time, the fact that respondent had been identified by Mrs. Chambers at the lineup on May 12 (R. 22–25).

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[3] The fact that the prisoners were asked to repeat words does not appear in the record. It was disclosed by government counsel on oral argument before the court of appeals, and was considered by a majority of the panel in order to remove the fact "as a possible basis for the filing of a petition for post conviction review at a later date" (R. 45 n. 1).

[4] Pickett testified that he had helped plan the robbery with respondent and Briggs but that he had decided not to participate in its execution since he was well known in the area (Tr. 71). Briggs testified that he was the one who had driven the automobile and that respondent was the one who had entered the bank (Tr. 134–139). Prior to respondent's trial, both Pickett and Briggs had pleaded guilty to the present indictment and had been sentenced (Tr. 103–104, 108; see Tr. 16).

Gray also described the holdup of the bank (R. 27–31) and identified respondent as the robber (R. 29). He stated that respondent had worn grey khaki trousers, a long-sleeved sport shirt, and a broad-brimmed straw hat (R. 31), that he had carried a nickel-plated pistol (R. 28), and that he had a strip of tape on each cheek (R. 30). Just before the conclusion of the direct examination, Gray was questioned briefly concerning the lineup which had been revealed in the cross-examination of Mrs. Chambers (R. 30–31). Gray's cross-examination related principally to the pre-lineup observation, through the open door, of agent Albert and the man resembling respondent (R. 32–35).

At the conclusion of the testimony, defense counsel moved for a judgment of acquittal on the ground that respondent's Fifth and Sixth Amendment rights were violated when the lineup was conducted without notice to respondent's attorney. Counsel also moved to strike the identification testimony of the two bank employees (R. 38–39). The motions were denied (R. 39).

3. The court of appeals, one judge dissenting, reversed respondent's conviction on the ground that the post-indictment lineup in the absence of respondent's appointed counsel violated respondent's Sixth Amendment rights. The majority expressly adopted the view of the dissenting judges in *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731 (C.A. 2, *en banc*), certiorari granted, 384 U.S. 1000. The dissenters in *Stovall* believed that an indicted defendant is entitled to the assistance of counsel when the government "wishes to make use of him to ob-

tain evidence that will have independent testimonial value" (R. 47), whether or not the desired evidence is of the kind protected by the Fifth Amendment. The majority in this case said that, had counsel been present, he could have instructed respondent not to make the responses requested for purposes of voice identification, and that he could have prevented the situation whereby the bank employees saw respondent before the lineup took place (R. 47–48). In the circumstances, the majority found that the "illegal procedure" might well have prejudicially colored the bank employees' courtroom identification (R. 48–49). The majority concluded that reversal was required, and that in the event of a new trial "the evidence of the two bank witnesses, following the occurrence that we have held to have violated Wade's rights, must be omitted" (R. 49).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, together with *Gilbert* v. *California,* No. 223, this Term, and *Stovall* v. *Denno,* No. 254, this Term, present the question whether the clause of the Sixth Amendment which guarantees to an accused in a criminal prosecution "the assistance of counsel for his defence" requires that a defendant's attorney be given notice and an opportunity to be present at a witness' pretrial identification of the defendant. Our basic position is that a witness' pretrial identification of the features or voice or mannerisms of an accused is not a stage of the criminal proceeding within the meaning of the Sixth Amendment's guarantee of counsel. Unlike the various

other phases of a criminal proceeding to which this Court has held the assistance-of-counsel clause applicable, a pretrial identification does not involve the presentation, preparation or preservation of any part of an accused's "defence." Whether it occurs before or after indictment, identification is not a stage of the adversary process by which guilt or innocence is determined; it is, rather, part of the prosecutor's preparation of his case—to determine the extent of the witness' knowledge or to verify the reliability of his prospective testimony. We urge that a defendant is no more constitutionally entitled to have his attorney present at a witness' pretrial identification of an accused than during any other portion of a prosecutor's pretrial interview of that witness.

1. The government's investigation and preparation of a criminal prosecution for trial is, by its very nature, an *ex parte* process. The prosecutor, like the defendant, prepares his case in privacy, and the interviewing of witnesses and their identification of weapons carried by an offender, clothing worn by him, or the physical appearance of the offender are all phases of the process of interview and preparation. There is no meaningful difference between a witness' pretrial identification from photographs and a similar identification made at a lineup. It has never been suggested that counsel must be present at the former, and the latter should be subject to the same rule.

This is completely consistent with the policies underlying the Sixth Amendment's guarantee of counsel. Fairness requires that an accused be represented and advised by an attorney whenever he joins issue in an

adversary proceeding with the prosecution—which is also represented by legal counsel. But a pretrial identification—whether or not it takes the form of a lineup—is not an adversary proceeding. The accused is present not because—as is true in an interrogation—information is being sought *from him;* he is there only so that others, from whom information is being sought, will be able to observe him. And since the constitutional privilege against self-incrimination is not in jeopardy in these circumstances, the assistance-of-counsel guarantee is not needed to protect that constitutional right.

Nor is the accused's presence the touchstone for determining whether there is a constitutional right to counsel. There are many instances in which only ministerial acts are done in the accused's presence, and the critical aspect of that phase of the investigation occurs in the accused's absence. It would be anomalous, for example, to require counsel to be present when an accused is fingerprinted or photographed, but to allow the comparison of fingerprints or the identification of photographs to be conducted in his absence.

Finally, counsel has no attorney's function to perform at a pretrial identification. The law-enforcement officials who have the accused in custody would not be obliged to heed his suggestions regarding lineup procedures. At most, he is an additional witness to what occurs—a subject on which the accused may personally report or testify in substantial detail. Nor is counsel needed to advise an accused on the exercise of constitutional rights, since no constitutional rights

are jeopardized by a pretrial identification (as contrasted with an interrogation). To the extent that counsel's presence might tend to promote fair procedures, he is more needed at those phases of the investigation and preparation of a case from which an accused is absent than at the stages where the defendant's physical presence is required.

2. The lineup in this case violated no Fifth Amendment privilege against self-incrimination; respondent was not asked to provide any evidence whatever "of a testimonial or communicative nature" within the meaning of *Schmerber* v. *California,* 384 U.S. 757. Observation by witnesses of respondent's appearance and physical characteristics infringed no constitutional privilege. And in asking respondent to speak a prescribed sentence, the government was not compelling any form of testimonial disclosure. All it was obtaining from respondent was a display of the sound of his voice—as much a physical characteristic as his size, the color of his hair, or his gait.

3. Even assuming, *arguendo,* that it was improper to conduct the pretrial identification in the absence of counsel, the only evidence which would be subject to exclusion on account of this failure would be the "product" of the illegality. The court below went far beyond barring affirmative use by the prosecution of testimony relating to the lineup (which was the remedy urged by the dissenters in the *Stovall* case, No. 254, this Term); it held that the immediate victims of the crime might not identify the accused at the trial because they had been present at the lineup. Particularly in light of the facts of this case—where it

is entirely clear that the witnesses had ample opportunity to observe the robber when the crime was being committed and where one of the witnesses identified respondent from a photograph prior to the lineup—the courtroom identification cannot be deemed to have "been come at by exploitation" of the illegal lineup within the standard of *Wong Sun* v. *United States,* 371 U.S. 471, 488, recently re-affirmed in *Hoffa* v. *United States,* No. 32, this Term, decided December 12, 1966. No affirmative use of the lineup identification was made by the prosecution in this case. Consequently, irrespective of how the Court resolves the constitutional issue in *Gilbert, Stovall,* and this case, respondent's conviction should be reinstated.

ARGUMENT

I

PRETRIAL IDENTIFICATION OF AN ACCUSED IS NOT A STAGE OF THE CRIMINAL PROCEEDING WITHIN THE ASSISTANCE-OF-COUNSEL GUARANTEE OF THE SIXTH AMENDMENT

This Court's decisions establish beyond doubt that an individual accused in State or federal courts on a felony charge is constitutionally entitled to the assistance of counsel at every "critical stage in a criminal proceeding." *Hamilton* v. *Alabama,* 368 U.S. 52, 53–54; *White* v. *Maryland,* 373 U.S. 59; *Massiah* v. *United States,* 377 U.S. 201. The court below deemed that constitutional rule applicable here; the proposition on which it rested its decision reversing respondent's conviction was that government agents had "deprived him of the aid of counsel at a critical stage

of the prosecution" (R. 47)—*i.e.*, at the lineup where he was identified by the employees of the robbed bank. The court's characterization of the lineup as a "stage of the prosecution" (R. 45) reflected, we believe, a basic misapprehension of the nature and function of pretrial identification and, by the same token, an erroneous view of the protection afforded by the assistance-of-counsel guarantee of the Sixth Amendment. Pretrial identification is not, in any theoretical or practical sense, part of the formal adversary proceeding in which respondent's guilt or innocence is determined. Nor (whether it occurs before or after indictment) is it a preliminary stage of the criminal proceeding. Whatever the form of the identification procedure—whether it be a live "lineup" (otherwise called "show-up" or "identification parade") or a victim's face-to-face confrontation with a single accused (as in *Stovall*) or an identification made by a witness from photographs or motion picture film—it is a phase of an evidence-gathering investigation or merely one aspect of a prosecutor's preparation of the proof he intends to present at trial. The Sixth Amendment accords a defendant no greater right to have counsel present at such an identification than at any other juncture of the investigation or of the preparation of the prosecution's case.

1. *The nature of pretrial identification.*—The court below erred, we believe, because it confused two distinct processes which normally occur after criminal charges are filed and before trial is begun. One is the series of formal adversary proceedings preliminary to the trial itself, such as preliminary hearing, arraign-

ment, and pre-trial motions. Here an accused is plainly entitled to counsel's presence because he would otherwise be joining issue with the prosecution at a great disadvantage. The second pretrial process, which is different in kind from the more formalized adversary stages, consists of each side's investigation and preparation for trial. An accused is, of course, entitled to counsel to help him prepare his own defense. *Powell* v. *Alabama,* 287 U.S. 45. But preparation is, by its very nature, an *ex parte* process. Prosecutors are not entitled to be present when the defense investigates and prepares its case, and defense counsel have no constitutional right to participate in the prosecution's preparation or in its continuing investigations.

Investigation of a criminal charge does not, of course, end with the arrest of the accused or his indictment by a grand jury. The principle that probable cause is sufficient to sustain an arrest or an indictment is proof enough that our legal system does not contemplate that the prosecution's investigative efforts cease at that preliminary juncture. The fact is that in many instances substantial investigation after arrest or indictment is a necessity. Additional witnesses may be discovered and interrogated, handwriting may be compared, reports by ballistics experts may be analyzed, and finger and footprints may be taken and examined. All of these investigative steps, and others as well, may occur after an individual believed to be the perpetrator of the crime has been arrested or formally charged.

Pretrial identification through a lineup or by a confrontation between an accused and a victim or witness (in which the accused is not interrogated or otherwise requested to make testimonial disclosures) is, in essence, part of the prosecution's interview *of the witness*. The accused is, of course, present, but the evidence being sought is that of the witness. It is the witness who is requested to tell part of his story (*i.e.*, his description of the guilty man) in a meaningful, accurate and efficient manner by which the accuracy of his testimony may also be verified; the accused is present only as the object of the witness' observation. He is, in this respect, like an inanimate item of evidence which the witness might, in the course of the pretrial interview, be asked to examine. The presence of a defendant's counsel is plainly not required, for example, when, in the course of a pretrial interview, a witness is shown the accused's clothing or his automobile or any object he was believed to have carried or worn when he committed the offense. The same is true, we submit, when the accused is personally exhibited to the witness at that juncture.[5]

[5] This hypothetical demonstrates, we submit, that there is a substantial difference between counsel's absence at a pretrial interview and at trial. Obviously counsel could not be excluded when, in the course of trial, a witness identifies a weapon as having been used during the robbery, although it seems quite clear that he has no right to be present when, prior to trial, the witness first identifies the weapon in the prosecutor's office. Compare Judge Friendly's suggestion in his dissenting opinion in *Stovall* (355 F. 2d 731, 742, 743, and n. 3) that if counsel could not be excluded at trial he should not be excludible at any prior identification after the right to counsel has attached.

Indeed, pretrial identification may be accomplished by means which do not require the accused's personal and knowing participation. A witness may, for example, be shown a series of photographs, among which is a likeness of the accused, or a motion picture film in which the accused appears in a group.[6] Or if an indicted defendant has been released on bail, law-enforcement officials might bring a witness to the neighborhood of the accused's home or place of business and have the witness observe the defendant on a public street to advise whether his appearance is familiar. And a defendant who has not been released on bail might be observed by a witness in his prison cell.

There is no meaningful distinction, we submit, between these identifications and the lineup involved here and in *Gilbert* v. *California*, No. 223, this Term. The techniques of pretrial identification vary, of course, in the extent to which they afford verification of the accuracy of the witness' testimony. A lineup or a showing of a series of photographs tests the witness and may provide, in certain circumstances, reasons to doubt the truth of his story; observation of the accused when he is unaccompanied is a less reliable indicator of the witness accuracy or probity. But, in all these instances, the identification is part of the prosecution's interview of the witness—whether for preparation or investigation purposes—and it has never

[6] Such use of motion pictures as an identification technique has been suggested by Professor Wigmore. Wigmore, *The Science of Judicial Proof* (3d ed. 1937) § 253 at 541; Note, 25 Ill. (Northwestern) L. Rev. 550 (1931).

been suggested that defense counsel is entitled either to be informed that the prosecutor intends to conduct the interview in this manner or to be present when it actually takes place.

2. *The Sixth Amendment assistance-of-counsel guarantee.*—The Sixth Amendment assures an accused in any criminal prosecution of "the right * * * to have the assistance of counsel for his defence." That guarantee means, as this Court observed in *Gideon* v. *Wainwright,* 372 U.S. 335, 344, "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." At the heart of the Sixth Amendment's guarantee is the proposition that where the government and the accused join issue in an adversary proceeding, a defendant may not be handicapped by being forced to fend for himself against a trained prosecutor. The right extends, of course, not merely to the trial itself—where a skilled attorney is needed to steer the defense through the technicalities and nuances of formal legal proceedings—but to preliminary stages where the government is formally aligned against the defendant and he is called upon to make choices which have lasting legal significance. In all of these situations the procedural and substantive complexities of modern criminal law plainly exceed the comprehension of even a well educated layman. *Powell* v. *Alabama,* 287 U.S. 45, 69. In order to assure that an accused's vital interests will be adequately protected it is essential that a trained attorney represent him, just as a trained attorney repre-

sents the government. "To pit a layman against a trained prosecutor, operating under the complex procedural and evidentiary rules of the courtroom, creates a serious risk that a man who ought to win his case will lose it." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 946 (1965).

The Sixth Amendment does not, however, give an accused's counsel a constitutional right of entree to the informal and non-judicial processes of investigation and preparation of the government's case. These processes involve no adversary confrontation between the government and the accused; there is no danger that the accused, if unrepresented, will be overborne by a trained prosecutor. There is, in short, no unfairness in permitting the prosecutor to build and prepare his case in the same privacy as an accused's counsel fashions his defense. And even if the presence of the accused is required for some part of the government's post-indictment investigation, that does not, *ipso facto*, entitle the accused to have his attorney present.

This view of the protection afforded by the Sixth Amendment is not inconsistent with *Massiah* v. *United States*, 377 U.S. 201, *Escobedo* v. *Illinois*, 378 U.S. 478, or any other decision concerning an interrogation or other conduct aimed at eliciting incriminating *testimonial* disclosures from an accused. When the prosecution seeks, after indictment, to obtain admissions from a defendant either by subterfuge (as in *Massiah*) or by open interrogation (as in *Spano* v. *New York*, 360 U.S. 315), it is directly confronting

the accused and seeking testimonial proof *from him*. In every real sense, such a practice is an adversary confrontation between the prosecution and the defendant, and the latter may not then be handicapped by being denied the legal assistance to which he is entitled at trial and at all preliminary legal proceedings.[7] Although the presence of the accused is necessary for certain kinds of pretrial identification, the prosecution is not thereby seeking anything *from him*. A lineup does not, in other words, create a situation in which the government is pitted against the defendant. Consequently, the Sixth Amendment guarantee in inapplicable.

Moreover, any custodial *interrogation* calls into play the protections needed to safeguard the constitutional privilege against self-incrimination which this Court discussed in *Miranda* v. *Arizona*, 384 U.S. 436. Counsel is entitled to be present at a post-arrest or post-indictment interrogation, whether open or secret, because the constitutional privilege is at stake. The same is obviously not true of a custodial *identification* at which the accused is asked no questions and permitted to make no admissions. The Fifth Amendment privilege against self-incrimination is not endangered in such circumstances (see pp. 25–29, *infra*),

[7] The separate opinions in *Spano* (360 U.S. at 326, 327) and the majority opinion in *Massiah* (377 U.S. at 204–206) observed that post-indictment interrogations of a defendant aimed at eliciting a confession are a means of bypassing an orderly public trial and rendering it superfluous. The Court's opinion in *Escobedo* v. *Illinois*, 378 U.S. 478, 487, made the same point by noting that if interrogation in the absence of counsel were permitted, the trial would become "no more than an appeal from the interrogation * * *."

and counsel is not needed to secure it against invasion. See *Schmerber* v. *California,* 384 U.S. 757, 765–766.

3. *The presence of the accused.*—To be sure, personal identification of a defendant (as contrasted with photograph identification) differs from other forms of government preparation and investigation in that it requires the physical presence of the accused. The court below adopted the position taken by the dissenters in *Stovall* (355 F. 2d 731, 743) that an accused has an absolute right to the presence of counsel whenever the prosecution "wishes to make *use of him* to obtain evidence that will have independent testimonial value" (R. 47; emphasis added). We submit that the presence of the accused is immaterial for Sixth Amendment purposes when he is being "used" only in the sense that he is "the source of 'real or physical evidence' * * *" (*Schmerber* v. *California,* 384 U.S. 757, 764). As we demonstrate at pp. 19–25, *infra,* a lawyer does not, in such circumstances, act as legal counsel to the accused but merely as a bystander and witness.[8]

Moreover, a rule which would draw the line between what may and what may not be done in the absence of counsel on the basis of the accused's physical presence would, in many of its applications, bear no relation to any conceivable purpose of the assistance-of-counsel

[8] We also note that, in any event, the prosecution did not, in this case, seek to use the pretrial identification as "evidence that will have independent testimonial value." Unlike *Stovall*, testimony concerning the lineup was first introduced in this trial by the defense and was not referred to by the prosecution other than in response to the defense cross-examination (see pp. 34–36, *infra;* R. 19–25, 30–31).

guarantee. If presence of the accused is the touchstone, counsel would be entitled to be present when an indicted defendant in custody is being fingerprinted or when hair, nail, skin or blood samples are taken from him. But since the accused is not present when the fingerprints are compared or when the samples are analyzed in a laboratory, his attorney could be absent at the stage when the critical determination is being made. Similarly, if a witness is asked to identify a defendant from photographs, counsel would—under the rule of the court below—be present when the the picture is taken but not when it is examined by the witness.

The infirmity of the rule adopted by the court below and by the dissenters in *Stovall* is further demonstrated by the anomalous results to which its logic would lead. Must counsel for an indicted defendant be called in before the defendant is searched incidental to his arrest or before he is photographed and fingerprinted as part of standard "booking" procedure? Must counsel for a defendant who is free on bail be advised whenever a government witness is taken to observe the accused on a public street for identification purposes? In each of these cases evidence of "independent testimonial value" is obtained as a result of the defendant's presence after the right to counsel has attached. Obviously, we submit, it is not the presence or absence of the defendant which controls the application of the constitutional guarantee.

4. *The function of counsel.*—An additional indication that an indicted defendant has no constitutional right to have an attorney present when he is being

identified prior to trial is the very limited function that an attorney could serve in such circumstances. A lineup is not an adversary proceeding over which a judge presides and where objections may be made and ruled upon. Law-enforcement officials who have a defendant in custody are not obliged to hear his attorney's objections to the procedures they employ for pretrial identification, much less to adjust their lineup to the attorney's views of what is appropriate. Consequently, the court below erred when it hypothesized that "[c]ounsel, if present, might also have been able to prevent the placing of the suspect in a place where he could be seen separately by the prospective prosecution witnesses before the lineup took place" (R. 48). Whether counsel could have prevented this incident—which appears, at any rate, to have been quite accidental, if it occurred at all (see pp. 37–38, *infra*)—is highly speculative. It is clear, however, that counsel could not have asserted any legal right to prevent it from happening. At most, he would have been an additional witness to circumstances which the defendant himself was able to see and report, and to which he was fully capable of testifying.*

Nor does the defendant need the advice of counsel to assert some legal right at a lineup. "There is no

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* In England, the presence of the accused's counsel is permitted at a lineup (identification parade) under a rule of procedure. It is well recognized, however, that he has no active function to perform. An accused "must be told that he may have his solicitor or a friend present, provided, of course, that they take no part in the proceedings * * * [I]n the improbable event of such a person attempting to interfere with the conduct of the parade, there is the simple remedy of ejection * * *." Williams, *Identification Parades*, [1955] Crim. Law Rev. (Eng.) 525, 528.

law or decision which says that a man, free or incarcerated, has a constitutional right not to be observed and possibly identified as the perpetrator of a crime." *Rigney* v. *Hendrick,* 355 F. 2d 710, 712 (C.A. 3), certiorari denied, 375 U.S. 975. As the Court of Appeals for the District of Columbia Circuit commented in a recent case involving testimony by witnesses of a post-arrest confrontation of an accused who was unrepresented by counsel: "The absence of counsel at the time of the confrontation at the scene of the crime did not deprive Appellant of a right to silence, a right to withhold evidence or any other right which could have been effectively asserted had counsel been present." *Kennedy* v. *United States,* 353 F. 2d 462, 466. The majority of the court in the *Stovall* case (355 F. 2d 731, 739) observed:

> If Stovall had had counsel, what could counsel have done to thwart the identification? He could not have arranged to have Stovall continuously wear a hood or mask over his face to avoid identification, nor could he have ordered the police forthwith to halt their identification activities * * *

See also *Gilbert* v. *United States,* C.A. 9, No. 19,940, decided September 16, 1966, pending on writ of certiorari, No. 1011 Misc., this Term; *Williams* v. *United States,* 345 F. 2d 733 (C.A.D.C.), certiorari denied, 382 U.S. 962; *People* v. *Lopez,* 60 Cal. 2d 223, 241–243, 384 P. 2d 16, certiorari denied, 375 U.S. 994.

We demonstrate at pp. 25–29, *infra,* that there was no violation of the Fifth Amendment's privilege against self-incrimination in requiring the accused to appear in the lineup or to recite words which were

not "of a testimonial or communicative nature" (*Schmerber* v. *California*, 384 U.S. 757, 761). Quite clearly, therefore, counsel was not needed, as he would be in case of an interrogation, to safeguard the Fifth Amendment privilege. The majority of the court below concluded, however, that counsel could have advised the accused that he was under no legal obligation to "make the verbal responses required of him by the prosecutor" (R. 48)[10]—*i.e.*, that he could refuse (albeit not on constitutional grounds) to submit to voice identification. (But see pp. 28–29, *infra*.) It has never been suggested, however, that when no constitutional right is endangered, an individual is entitled to an attorney to advise him that there is no legal obligation to cooperate with the police. The defendant's legal option of refusing to cooperate is no different here than where investigators interview a suspect who is not in custody. Apart from the privilege against self-incrimination (which is not in jeopardy in the absence of the "inherently compelling pressures" (*Miranda* v. *Arizona*, 384 U.S. 436, 467) of *custodial* interrogation), the suspect who is at liberty also has a non-constitutional right to refuse to cooperate. That right has not, however, been deemed to require the advice and assistance of counsel. See, *e.g.*, *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; cf. *Kitchell*

[10] By "prosecutor" the court apparently meant the F.B.I. agent. No government attorney was present, and contrary to the claim first made in respondent's brief in the court below, the F.B.I. agent himself was not a lawyer. See the affidavit of the F.B.I. agent dated November 19, 1965, which was appended to the government's brief below. Appendix, *infra*, pp. 37–38.

v. *United States*, 354 F. 2d 715, 720 (C.A. 1), certiorari denied, 384 U.S. 1011. See also *Schmerber* v. *California*, 384 U.S. 757, 765–766.

Nor is counsel constitutionally entitled to be present simply because his presence might contribute to the fairness of the identification. That same argument could be made with respect to all facets of a criminal investigation—both before and after a suspect's arrest or indictment. The Court of Appeals for the Ninth Circuit recently answered the same contention in *Gilbert* v. *United States*, No. 19,940, decided September 16, 1966, pending writ of certiorari, No. 1011, this Term, slip op. pp. 27–28:

> The same arguments as to assistance that counsel might render could also be made as to the taking and analysis of blood samples (*Schmerber v. California, supra*), the taking and comparison of fingerprints (*Smith v. United States*, D.C. Cir., 1963, 324 F. 2d 879), the obtaining and comparison of handwriting exemplars (*State v. Fisher*, Ore., 1966, 410 P.2d 216; *People v. Graves*, Cal., 1966, 411 P.2d 114), and to many other investigative procedures. As to each of these activities, and others like them, it can be argued that matters of judgment and proper procedure can vitally affect the result. Why, then, should not defense counsel, accompanied by experts participate in all of them, from beginning to end, to see that acceptable, fair procedures are used, scientific standards are maintained, and only the very best evidence is thus developed? One answer, we would think, lies in the need for expedition. Another is the disruptive effect upon investigators who would have opposing counsel breathing down

> their necks. We are inclined to doubt that once it began to appear that the evidence was likely to point to the guilt of the accused, his counsel's participation would be constructive. Another is that a criminal trial is not supposed to be a sporting contest. We conduct it as an adversary proceeding. But that does not mean that everything done by the state, preparatory to trial, for the purpose of proving or disproving guilt, is suspect as sloppy or biased or fraudulent.

It is possible, for example, for a prosecutor improperly to implant testimony in a witness' mind when he interviews that witness, or to suggest to a witness which of several photographs he should identify or how to describe the clothing worn by the offender when he committed the crime. The fairness of a lineup, like the fairness of any other phase of an investigation, is insured not by the presence of counsel but by "full exposure of the facts at trial, through cross-examination and the presentation of contrary evidence, and * * * the impartiality and good sense of the judge and jury." *Gilbert* v. *United States, supra,* at p. 28; see *Payne* v. *United States,* 294 F. 2d 723, 726 (C.A.D.C.), certiorari denied, 368 U.S. 883.

Indeed, if it is to insure the fairness of investigative procedures that the right to counsel is to be accorded in these circumstances, there is less reason to require counsel's presence when the accused himself is being "used" than when the accused is absent. When the defendant is present—as he is during a lineup—he may personally observe the circumstances, report

them to his attorney,[11] and (if he chooses to take the stand) testify about them at trial.[12] When the prosecutor interviews a witness in the absence of an accused, on the other hand, there is no one present to verify the fairness of the interview or to report any irregularities. If the prosecution were tempted to engage in "sloppy or biased or fraudulent" conduct (*Gilbert* v. *United States, supra*), it would be far more likely to do so when the accused is absent than when he himself is being "used."

II

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED WHEN THE FEATURES, MANNERISMS, OR VOICE OF AN ACCUSED IN CUSTODY ARE SUBJECTED TO PRETRIAL IDENTIFICATION

A. *Appearing before a witness to the offense involves no testimonial communication.*

Neither the decision of the majority below, nor the dissenting opinion in *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731 (C.A. 2, *en banc*), certiorari granted, 384 U.S. 1000, on which the court below relied, held that an accused's pretrial identification by a witness to the offense violated the accused's Fifth

[11] That was apparently done here since respondent's counsel knew the circumstances of the lineup at the time of trial (R. 22–23, 32–33).

[12] If the accused's contention is that the identification procedure was so unfair that it would violate due process even to admit it in evidence (see *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4)), he could take the witness stand, in the absence of the jury, on a motion to suppress or exclude the evidence, without waiving his Fifth Amendment privilege not to testify during the trial itself.

Amendment privilege against self-incrimination.[13] The privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[14] *Schmerber* v. *California,* 384 U.S. 757, 761. It is a "prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Holt* v. *United States,* 218 U.S. 245, 252–253. Placing respondent in a lineup, in order that witnesses to the bank robbery might observe his physical characteristics, involved no breach of his Fifth Amendment privilege. His appearance and movements did not communicate a state of mind or have any other testimonial significance. He and the other participants in the lineup were simply put on display so that witnesses might compare them with their memories of the physical characteristics previously displayed to them by the perpetrator of the offense. There being no testimonial revelation in the process, an accused may be viewed in the courtroom by an identifying witness

[13] Chief Judge Lumbard, concurring, and Judges Friendly and Waterman, dissenting, agreed with the majority in *Stovall* that the Fifth Amendment privilege was not involved in an accused's pretrial exposure to the view of an identifying witness (355 F. 2d at 741 and 743). The court in the present case found "no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him" (R. 46).

[14] Testimonial evidence "otherwise" provided may be by writing, nodding or shaking one's head, signaling, or, as suggested in *Schmerber*, 384 U.S. at 764, by responding physiologically in a polygraph examination.

(*Peoples* v. *United States*, 365 F. 2d 284 (C.A. 10)) or by the jury in order to compare his features with a description in evidence. See *Holt* v. *United States*, 218 U.S. 245, 252–253. See also *United States* v. *Evans*, 359 F. 2d 776 (C.A. 3); *Caldwell* v. *United States*, 338 F. 2d 385 (C.A. 8); 8 Wigmore, *Evidence*, § 2265 at p. 386 (McNaughton rev. 1961).

B. *Speaking a prescribed sentence before a witness to the offense involves no testimonial communication.*

1. Similarly, requiring respondent and the other participants in the lineup to speak a prescribed sentence in order that the witnesses to the offense might hear and attempt to identify the sound of the offender's voice involved no breach of any Fifth Amendment privilege. It is communication and not the physical act of speech which is constitutionally protected. One's voice is, in itself, "as much a physical characteristic as the color of his eyes" (*Gilbert* v. *United States*, C.A. 9, No. 19,940, decided September 16, 1966, pending on writ of certiorari, No. 1011 Misc., this Term, slip op. p. 18), and the fact that it is a common means of achieving communication is incidental in this context. Individual manners of speaking or writing may be displayed without testimonial communication. Here respondent and the other participants were told what to say; the only thing sought to be revealed was the sound of their voices so that witnesses might compare these sounds with those they heard at the time of the robbery. What was involved was an exhibition of a physical characteristic for purposes of comparison rather than an extraction of knowledge for the purpose of securing

evidence of guilt. Since such a situation presents no "attempt * * * to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one" and the privilege against self-incrimination is not involved.[15] 8 Wigmore, *Evidence*, § 2265 at p. 386 (McNaughton rev. 1961); Note, 24 Ind L.J. 587 (1949). See also *State* v. *King*, 44 N.J. 346, 357, 209 A. 2d 110; *People* v. *Lopez*, 60 Cal. 2d 223, 244, 384 P. 2d 16, certiorari denied, 375 U.S. 994; *State* v. *Freeman*, 408 P. 2d 612, 616 (Kan.); *Boyer* v. *State*, 182 So. 2d 19 (Fla.); *Dyson* v. *State*, 238 Md. 398, 209 A. 2d 609; cf. *State* v. *Ramirez*, 76 N.M. 72, 412 P. 2d 246, 248; *Commonwealth* v. *Aljoe*, 420 Pa. 198, 216 A. 2d 50, 52–53.

2. It is immaterial that an accused must cooperate, *i.e.*, undertake to speak, if there is to be voice identification. Since the privilege against self-incrimination does not protect a physical characteristic from disclosure, it is irrelevant whether or not that display involves a cooperative muscular movement on the part of the accused. Indeed, almost any display

[15] Any other rule would place an unwarranted premium on an offender's use of a mask. It would often effectively preclude any identification of an offender who wore a hood at the time of the offense, or who committed an offense involving use of a telephone, no matter how distinctive the offender's voice. See *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4); cf. *United States* v. *Moia*, 251 F. 2d 255 (C.A. 2). And it is clear that the voice contains "items which impress themselves sometimes on the perception and the memory more sharply than do the features or the garments." 3 Wigmore, *Evidence*, § 786a at p. 165 (3d ed. 1940).

of a physical characteristic—including standing, walking, and sitting—involves some active cooperation and muscular control, and "use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently from that of the arm muscles." *United States ex rel. Stovall* v. *Denno,* 355 F. 2d at 743 (dissenting opinion). If the requirement of active cooperation brought an accused's conduct within the protection of the Fifth Amendment, an accused could defeat almost any identification by sprawling face downward on the floor or clasping his hands to his face. It is not impermissible, we submit, to require an accused in custody to display at least those physical characteristics, such as appearance, gait, and speech, which are regularly exposed to public view. It would indeed be anomalous if the government were prohibited from calling upon an accused to speak a sentence, but were perfectly free to puncture his body and withdraw a blood sample. See *Schmerber* v. *California,* 384 U.S. 757.[16]

[16] This case does not involve a "re-enactment" of the crime, and we do not read the opinion of the court below (R. 46) as concluding that it did. Respondent and the other individuals in the lineup were directed to wear white tape on their faces (as the robber had) and to speak the words which the robber had uttered. This was the most fair procedure to test the witnesses' recollections since it focussed on precisely the physical characteristics which they had seen and heard at the time of the robbery. See 3 Wigmore, *Evidence,* § 786a(B)2(b), p. 164 (3d ed. 1940); Williams, *Identification Parades,* [1955] Crim. Law Rev. (Eng.) 525, 534, 536. The procedure used at the lineup was not suggestive to the witnesses in the sense that it focussed attention on respondent rather than on any of the other participants. Nor was there any "re-enactment" of the kind which might produce visible physiological reactions in a guilty suspect or otherwise induce admissions of guilt.

III

THE TESTIMONY OF WITNESSES WHO IDENTIFIED RESPONDENT IN OPEN COURT WAS ADMISSIBLE IRRESPECTIVE OF WHETHER RESPONDENT'S CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE LINEUP

Having found that respondent's Sixth Amendment rights had been violated at the lineup, the court below held that it was error for the trial judge to admit the identification testimony of the bank's employees, who had engaged in the pretrial identification. The court went far beyond the dissenters in *Stovall* (355 F. 2d at 743), who concluded only that it was impermissible for the prosecution affirmatively to introduce proof pertaining to the lineup; it held that since "it cannot be said with any certainty that [the witnesses] would have recognized [respondent] at the time of trial if this intervening lineup had not occurred" (R. 48), their trial identification of respondent was inadmissible.[17] Under this view, no matter how long or how clearly a witness observed a defendant during the commission of the offense, he would not be permitted to identify the offender in open court if he participated in an "improper" lineup before trial. This exclusionary rule is both unprecedented and unsound in principle.

1. The evidence which was held impermissible by the court below—the courtroom identification of re-

[17] We read the court's opinion as excluding only the identification portion of the bank employees' testimony, not the proof regarding the circumstances of the robbery. Under no conceivable set of facts, we submit, could the testimony concerning what the robber had said and done while in the bank have been colored by the lineup.

spondent as the offender—was not the product of the asserted constitutional violation. The witnesses and their potential testimony were known to the prosecution before the challenged lineup. Those witnesses' recollections of the appearance of the accused similarly antedated the lineup. Hence the courtroom identification was derived not from the assertedly invalid lineup but from an independent source—the conduct of the defendant and his observation by the witnesses at the time when the offense was committed.

As recently as *Hoffa* v. *United States,* No. 32, this Term, decided December 12, 1966, slip op. pp. 15–16, this Court re-affirmed the standard governing exclusion of evidence announced in *Wong Sun* v. *United States,* 371 U.S. 471, 488: that the critical question in deciding whether assertedly tainted evidence should be suppressed is "whether, granting establishment of the primary illegality, the evidence * * * has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." The court below determined that it could not "be said with any certainty" that the witnesses would have identified respondent at trial if not for the intervening lineup. But that does not mean that their trial testimony was "come at by exploitation" of the assertedly illegal identification. What the Court of Appeals for the Ninth Circuit said in *Gilbert* v. *United States,* No. 19,940, decided September 16, 1966, pending on writ of certiorari, No. 1011 Misc., this Term, slip op. p. 31, is fully applicable here:

> The courts have excluded that part of the testimony of a witness that describes what he saw

or heard on an occasion when his seeing or hearing was in violation of a constitutional right of the accused. See *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 485. And under the "fruit of the poisonous tree" doctrine (*Nardone* v. *United States,* 1939, 308 U.S. 339, 341) other evidence obtained by means of the unconstitutional activity has also been excluded. But, as is pointed out in *Nardone,* "If knowledge of them [the facts] is gained from an independent source, they may be proved like any others." (P. 341.) Here, every witness who was at the lineup had knowledge gained from an independent source. Each had actually seen one of the robberies and had seen Gilbert participating in it. Each identified him in the courtroom. Each such identification necessarily harked back to what the witness saw at the scene of the crime. The accuracy of the recollection of the witness may or may not have been bolstered or shaken during the lineup proceeding. But surely the knowledge gained from the independent source, at the scene of the crime, remained. We reject the idea that the witnesses should not have been permitted to testify at all because they participated in the lineup.[18]

Indeed, the facts of record here demonstrate persuasively that the lineup identification could have had only a negligible effect on the witnesses' identification of respondent at trial. When the robber entered the bank, no customers were present. He approached

[18] In *Payne* v. *United States,* 294 F. 2d 723, certiorari denied, 368 U.S. 883, the Court of Appeals for the District of Colum-

Mrs. Chambers, who was standing behind the counter, and asked to cash a check (R. 10). He then drew a pistol, directed it at Mrs. Chambers, went behind the counter to where she was standing, handed her a pillow case, and told her to get the money (R. 11–12). She took the pillow case into the vault where Mr. Gary was there getting some papers (R. 12–13, 27–28). The robber stood in front of the doorway to the vault with his pistol trained on the two employees as they filled the pillow case with currency (R. 13–14, 27–28). After telling Gray that if he would follow directions no one would be hurt (R. 14, 29), the robber directed Gray to go to the teller's cage and put the rest of the currency in the bag (R. 14–15, 29). He then ordered Gray to return to the vault where Mrs. Chambers had remained, and to close the door behind him (R. 14, 16, 30). Witnesses Chambers and Gray both obviously had a full opportunity to observe the robber carefully, and that full observation is reflected in their testimony at trial. Mrs. Chambers was able to testify to the robber's general demeanor—outwardly calm when he first entered the bank but nervous during

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bia Circuit rejected the claim that a courtroom identification was tainted by an assertedly illegal lineup (294 F. 2d at 727):

> The consequence of accepting appellant's contention in the present situation would be that [the witness] would be forever precluded from testifying against Payne in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified Payne as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination.

the latter part of the robbery (R. 19). Both testified with particularity about his clothing (R. 11, 31), both described the tape on the sides of his face (R. 11, 30), and both noted that the pistol was nickle-plated (R. 11, 28). Both identified respondent as the robber (R. 12, 29), and Gray re-affirmed that there was no doubt in his mind that respondent was the person who had robbed him (R. 36). Mrs. Chambers also testified that between the time of the robbery and the time of the lineup, she had been shown several groups of pictures by various law-enforcement officers. She did not recognize any of the pictures until, on one occasion, she was shown respondent's photograph among a group of eight or nine, and she then picked it from the file (R. 20).[19] The above testimony shows, we submit, that the witnesses' recollection of the details of the offense was clear and that their independent recollections, not the lineup, led to their identification of respondent.[20]

2. If, contrary to our view, respondent's constitutional argument is sound, the most that could properly be excluded, we submit, would be affirmative use by the prosecution of the lineup identification. That is what was involved in the *Stovall* case, and it is all

[19] Although Mr. Gray had also been shown groups of photographs (R. 31), he was not asked at trial whether he had identified a photograph of respondent.

[20] The testimony also negates any support for the courts' apparent concern that the witnesses' glimpse of respondent in the hallway prior to the lineup may some way have influenced their identification. Additionally, there is no indication in the record that either witness assumed that respondent was in the F.B.I. agent's custody; Mrs. Chambers had not seen the agent in the hallway (R. 23), and Mr. Gray, although he had seen and recognized the agent, was not certain that the man standing near the agent was respondent (R. 32–34).

that the dissenters there sought to establish. The dissenters in *Stovall* said that "exclusion of the hospital identification * * * would simply have required the prosecutor to rest on [the victim's] memory of the night of the dreadful crime and on her courtroom identification." 355 F. 2d at 745. The course taken by the prosecution in the present case would, therefore, satisfy the standard of the dissenters in *Stovall*.

In the present case, the government did not rely affirmatively on testimony regarding the lineup identification nor did the prosecutor suggest—as he did in his opening argument in *Stovall* (355 F. 2d at 741 n. 3, 745)—that it would be part of the government case.[21] The circumstances of the lineup were pur-

[21] This case is not affected by the fact that, after the defense had first developed the facts of the lineup identification in cross-examination of Mrs. Chambers, the government attorney briefly touched upon the matter at the end of his direct examination of Mr. Gray (R. 30–31). As noted by Judge Friendly in the original opinion of the three-judge panel in *Stovall* (Record, No. 254, this Term, p. 28), "Normally there could be no valid claim of error if a defendant presented evidence which he could bar and the State followed with a then harmless repetition." There, however, where the defense had cross-examined two police officers concerning the hospital identification before the victim testified, the panel noted that (*id.* at 28–29):

> the prosecutor had unequivocally announced at the start of the trail that Mrs. Behrendt would testify to her earlier identification; in this context, defense counsel's attempt to discredit such evidence in advance, while the detectives were available for cross-examination, rather than having to recall them, cannot fairly be deemed an independent attempt to introduce the identification as part of Stovall's case. * * *

At respondent's trial, the lineup identification was introducted and developed solely as a part of the defense case.

posefully and deliberately elicited by defense counsel in his cross-examination of the bank's employees in an effort to attack the accuracy of their memories and to lay a foundation for final argument to the jury. Hence the disclosure of the lineup identification affords no basis for reversing respondent's conviction.[22]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of conviction reinstated.

RALPH S. SPRITZER,
*Acting Solicitor General.**
FRED M. VINSON, JR.,
Assistant Attorney General.
NATHAN LEWIN,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

DECEMBER 1966.

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[22] The court below, in assessing whether the lineup identification might have contributed to respondent's conviction, stated that "the only other testimony by which Wade was identified with the crime was the testimony of his alleged accomplices, who admitted at trial to inconsistent statements" (R. 48). The reference to "inconsistent statements" was apparently directed to the fact that Pickett and Briggs, before being sentenced for the robbery of a San Antonio bank, had denied complicity in any other robberies, although after sentencing each acknowledged his role in the Eustace bank robbery and in a bank robbery which had occured at Hawkins, Texas, as well (Tr. 98, 100–101, 178–179).

* In lieu of the Solicitor General, who has disqualified himself.

APPENDIX

STATE OF TEXAS

AFFIDAVIT

COUNTY OF SMITH

I, KENNETH R. ALBERT, being duly sworn, depose as follows:

This affidavit is given in answer to the brief submitted by Weldon G. Holcomb, Attorney at Law, Tyler, Texas, on behalf of his client, BILLY JOE WADE, particularly to Point I supported by its argument.

Concerning Point I supported by its argument, the following is submitted:

The attorney for the appellant BILLY JOE WADE stated KENNETH ALBERT, a Special Agent of the Federal Bureau of Investigation was a licensed attorney, which is entirely false, since I never attended law school.

Where the attorney for the appellant stated witnesses CHAMBERS and GRAY observed appellant in the hallway and in the anteroom on the second floor of the courthouse in custody of MR. ALBERT, on May 12, 1965, this is not true. I never had the appellant in my custody, as he was taken from his jail cell by the local Sheriff and Jailer and escorted by them to the courtroom for purpose of holding a lineup. While in the hallway and in the anteroom, I was never alone with appellant. In the hallway and anteroom, there were always officers present, who had appellant in custody. While in the anteroom, there

were also present six other inmates of the county jail, who participated in the lineup.

On April 26, 1965, appellant was interviewed at the Smith County Jail concerning his participation in the robbery of the First State Bank, Eustace, Texas, on September 21, 1964. At this time, appellant was advised by me of his rights at which time he requested an attorney prior to discussing this matter. The interview was then concluded and appellant made no admissions. His request was brought to the attention of Assistant U.S. Attorney H. Don Nicholson on April 26, 1965. Appellant was never interrogated at any time after this regarding his participation in the robbery of the First State Bank, Eustace, Texas, on September 21, 1964.

/s/ Kenneth R. Albert
KENNETH R. ALBERT
Special Agent
Federal Bureau of Investigation

SWORN to and SUBSCRIBED before me on this 19 day of November, 1965.

/s/ Mary M. King
Notary Public
Smith County, Texas

My Commission expires
June 1, 1967.

U.S. GOVERNMENT PRINTING OFFICE:1966